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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

11	DAVID RIBOT, PERRY HALL,	)	Case No. CV 11-02404 DDP (FMOx)
	JR., DEBORAH MILLS, ANTHONY	)	
12	BUTLER, JENNIFER BUTLER,	)	<b>ORDER GRANTING IN PART AND</b>
	JONATHAN LUNA and LOIS	)	<b>DENYING IN PART MOTION FOR CLASS</b>
13	BARNES, individually, and on	)	<b>CERTIFICATION AND MOTION FOR</b>
	behalf of all others	)	<b>CONDITIONAL CERTIFICATION</b>
14	similarly situated,	)	
		)	[Dkt. Nos. 127 & 135]
15	Plaintiffs,	)	
		)	
16	v.	)	
		)	
17	FARMERS INSURANCE GROUP,	)	
	FARMERS INSURANCE EXCHANGE,	)	
18	21st CENTURY INSURANCE	)	
	COMPANY and AIG INSURANCE	)	
19	SERVICE, INC.,	)	
		)	
20	Defendants.	)	
		)	
21	_____	)	

Presently before the court are Plaintiff David Ribot, Perry Hall, Jr., Deborah Mills, Anthony Butler, Jennifer Butler, Jonathan Luna, and Lois Barnes (collectively "Plaintiffs")'s Motion for Class Certification Pursuant to Federal Rule of Civil Procedure 23 ("Class Certification Motion") and Motion for Conditional Certification Under 29 U.S.C. 216(b) ("Conditional Certification Motion"). Having considered the parties' submissions and

1 supplemental briefing and heard oral argument, the court adopts the  
2 following order.

3 **I. BACKGROUND**

4 Plaintiffs are current and former employees of Farmers  
5 Insurance and Twenty-First Century Insurance Company<sup>1</sup> who worked as  
6 "Customer Service Representatives" ("CSRs") in call centers, called  
7 ServicePoints and Help Points, in California, Oregon, Kansas,  
8 Texas, and Michigan. (Second Amended Complaint ("SAC") ¶¶ 1.4-1.5.)  
9 Plaintiffs' "principal job duty" was "to handle in-bound telephone  
10 calls from insurance agents and policyholders, to answer questions  
11 concerning home and automobile insurance policies, provide agents  
12 with technical support, underwriting advice, and assistance with  
13 billing and customer service to policy holders." (Id. ¶ 6.3.)  
14 Plaintiffs allege that they were "required to arrive approximately  
15 15 minutes before their scheduled shift in order to boot up their  
16 computers, load programs, log on to the telephone system, review  
17 emails and other essential work activities." (Id. ¶ 1.7.) They  
18 also allege that they performed post-shift duties, "including  
19 customer service calls that extend beyond the end of their shift  
20 and the tasks associated with shutting down their computer  
21 systems," for which they were not compensated. (Id.)

22 Plaintiffs filed their original Complaint on March 22, 2011.  
23 In July 2011, Plaintiffs learned of an investigation by the  
24 Department of Labor Wage and Hour Division ("DOL") into similar  
25 allegations at facilities in Oklahoma, Kansas, Oregon, Michigan,  
26 and Texas. Farmers and the DOL settled those claims on June 15,

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27  
28 <sup>1</sup>Acquired by Farmers in 2009.

1 2011. (Mot., Exhs. 1-3, FLSA Narratives.) The DOL reports  
2 indicate that Farmers changed its policy, requiring employees to  
3 log into the phone prior to booting up the computer and other  
4 activities. (See, e.g., Exh. 3 at 5.) The DOL found that Farmers  
5 was in compliance at ServicePoint locations by February 1, 2010,  
6 and at HelpPoint locations by May 10, 2010.

## 7 **II. CLASS CERTIFICATION**

8 Plaintiffs seek certification of five state law class actions  
9 to recover unpaid wages, overtime compensation, liquidated damages,  
10 attorneys' fees, and costs on behalf of current and former Customer  
11 Service Representatives ("CSRs") who are alleged to have been  
12 required to perform off-the-clock work. Each class comprises  
13 Farmers or 21st Century Insurance facilities in one of five states  
14 (California, Kansas, Texas, Michigan, Oregon).

### 15 **A. Legal Standard**

16 The party seeking class certification bears the burden of  
17 showing that each of the four requirements of Rule 23(a) and at  
18 least one of the requirements of Rule 23(b) are met. See Hanon v.  
19 Dataprods. Corp., 976 F.2d 497, 508-09 (9th Cir. 1992). Rule 23(a)  
20 sets forth four prerequisites for class certification:

21 (1) the class is so numerous that joinder of all members is  
22 impracticable; (2) there are questions of law or fact  
23 common to the class; (3) the claims or defenses of the  
24 representative parties are typical of the claims or  
25 defenses of the class; and (4) the representative parties  
26 will fairly and adequately protect the interests of the  
27 class.

1 Fed. R. Civ. P. 23(a); Hanon, 976 F.2d at 508. These four  
2 requirements are often referred to as numerosity, commonality,  
3 typicality, and adequacy. See Gen. Tel. Co. of Southwest v.  
4 Falcon, 457 U.S. 147, 156 (1982). "In determining the propriety of  
5 a class action, the question is not whether the plaintiff or  
6 plaintiffs have stated a cause of action or will prevail on the  
7 merits, but rather whether the requirements of Rule 23 are met."  
8 Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974) (internal  
9 quotation marks and citation omitted). This court, therefore,  
10 considers the merits of the underlying claim to the extent that the  
11 merits overlap with the Rule 23(a) requirements, but will not  
12 conduct a "mini-trial" or determine at this stage whether  
13 Plaintiffs could actually prevail. Ellis v. Costco Wholesale  
14 Corp., 657 F.3d 970, 981, 983 n.8 (9th Cir. 2011).

## 15 **B. Discussion**

### 16 **1. Ascertainability**

17 "Although there is no explicit requirement concerning the  
18 class definition in FRCP 23, courts have held that the class must  
19 be adequately defined and clearly ascertainable before a class  
20 action may proceed." Pryor v. Aerotek Scientific, LLC, 278 F.R.D.  
21 516, 523 (C.D. Cal. 2011) (internal citations and quotation marks  
22 omitted). "[A] class will be found to exist if the description of  
23 the class is definite enough so that it is administratively  
24 feasible for the court to ascertain whether an individual is a  
25 member." O'Connor v. Boeing North American, Inc., 184 F.R.D. 311,  
26 319 (C.D. Cal. 1998).

27 Defendants assert that the class is not ascertainable because  
28 the class definitions contain "representative job titles" rather

1 than a fixed set of positions or job descriptions. (Opp. to Class  
2 Cert. at 28; for class definitions, see Class Cert. Motion, Exh.  
3 44.) They also assert that these "representative job titles"  
4 contradict Plaintiffs' papers where the putative class is defined  
5 as including employees with "customer facing job positions" whose  
6 "central job duty was to take inbound telephone calls from  
7 Defendants' policyholders and agents." (Class Cert. Motion at 13.)

8 The court finds that identifying the class members by their  
9 function rather than their position or title does not make it  
10 infeasible to determine which employees are class members. For  
11 purposes of clarity, the court modifies each class definition to  
12 include the more specific description of the job function, as  
13 follows:

14 All persons who are, or have been, employed by Farmers  
15 Services, LLC., and/or Farmers Insurance Exchange in the  
16 State of [state name] as call center employees who  
17 performed the job duties of a "Customer Service  
18 Representative" or a similar customer-facing job position  
19 with the central duty of taking inbound telephone calls  
20 from policyholders and agents, during the time period  
21 between [date] and [date].

22 (Emphasis indicates the court's modifications.)

## 23 2. Overbreadth

### 24 a. Start date of class period

25 Defendants also assert that the class is overbroad because it  
26 includes members whose claims are barred by state statutes of  
27 limitations. For instance, the claims under California law have a  
28 four year statute of limitations. Cal. Bus. & Prof. Code § 17208.

1 The action was filed on March 22, 2011, so the class period would  
2 ordinarily begin no earlier than March 22, 2007. However, the  
3 California class period is defined as beginning on July 22, 2005.  
4 (Class Cert. Mot., Exh. 44.) Defendants speculate that Plaintiffs  
5 arrived at this class period by adding on a 19-month tolling period  
6 based on the DOL-Farmers Tolling Agreement. (Martoccia Decl., Exh.  
7 32.)

8 **i. DOL-Farmers Tolling Agreement**

9 The Tolling Agreement states that the "Secretary or affected  
10 employees may ultimately bring legal proceedings under the Act,"  
11 but that in order to allow time for settlement discussions, "the  
12 Firm agrees not to raise this tolling period in any other defense  
13 raised by the Firm (including laches) that otherwise would be  
14 available to the Firm concerning the timeliness of any legal  
15 proceedings that may be brought against the Firm." (Martoccia  
16 Decl. Exh. 32.)

17 Defendants argue that the Tolling Agreement "tolls only the  
18 DOL's ability to commence an action pending the resolution of the  
19 DOL investigation" and that because putative class members are "not  
20 parties to the agreement," it does not apply to suits initiated by  
21 them. (Opp. at 29 n. 108.) They also argue that the tolling  
22 agreement does not apply to state law claims because it does not  
23 mention such claims. (Id.)

24 Plaintiffs assert that according to its plain language, the  
25 Tolling Agreement bars Farmers from asserting any statute of  
26 limitations argument, no matter the cause of action or the party  
27 asserting that cause of action.

1 The court finds that the Tolling Agreement is reasonably  
2 interpreted as applying only to claims under the FLSA, not to state  
3 law claims. The Tolling Agreement mentions only FLSA claims. It  
4 frames the purpose of the Agreement by stating that "[t]he  
5 Secretary or affected employees may ultimately bring legal  
6 proceedings under the Act. However, the running of the statute of  
7 limitations . . . may bar the assertion of certain rights under the  
8 Act . . ." (Martoccia Decl., Exh. 32 at FIE001163 (emphasis  
9 added).) Additionally, paragraph 5 states that "The Firm agrees  
10 that this Agreement . . . may be introduced into evidence as proof  
11 of the tolling agreed to herein, in all legal proceedings that may  
12 be brought pursuant to Sections 16(b), 16(c), and/or 17 of the  
13 Act." (Id. at FIE001164.)

14 **ii. Conclusion on class period start date**

15 Because the statute of limitations is tolled only for claims  
16 under the FLSA, the putative class, which is asserting only state  
17 law claims, cannot benefit from it. For this reason, the start  
18 date of all classes should reflect the relevant state law statute  
19 of limitations without including any tolling on the basis of the  
20 DOL-Farmers Tolling Agreement.<sup>2</sup>

21 **b. End date of class period**

22 Defendants also assert that the class period is overbroad  
23 because of the modification of phone login procedures at  
24 ServicePoint contact centers after February 1, 2010, and at  
25 HelpPoint contact centers after May 10, 2010. According to the

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27 <sup>2</sup> This modification of class start dates does not affect any  
28 other potential claims to tolling that class members might  
ultimately assert, apart from the DOL-Farmers Tolling Agreement.

1 DOL, these changes brought Farmers into compliance; Plaintiffs do  
2 not contest that the violations related to pre-shift work ceased  
3 with the modification of the log-in procedures. (Opp. to Class  
4 Cert at 29.) As discussed in sections II.B.4.b.iii-iv below, the  
5 court finds that Plaintiffs have presented a common question of law  
6 and fact only as to their claims regarding pre-shift work. The  
7 class is accordingly limited to the period prior to the change in  
8 policy regarding log-on procedures, namely February 1, 2010, at  
9 ServicePoint contact centers and May 10, 2010, at HelpPoint contact  
10 centers.

### 11 3. Numerosity

12 To meet the requirements of Rule 23(a), Plaintiffs must first  
13 demonstrate that "the class is so numerous that joinder of all  
14 members is impracticable." Fed. R. Civ. P. 23(a)(1). Courts will  
15 typically find the numerosity requirement satisfied when a class  
16 includes 40 or more members. See Rannis v. Recchia, 380 Fed. Appx.  
17 646, 651 (9th Cir. 2010).

18 Plaintiffs' evidence of numerosity is the FLSA Narrative  
19 Report, which identified 1,288 affected employees in Kansas, 446 in  
20 Oregon, 650 in Michigan, and 557 in Texas. (Exh. 3, 5-6.) They  
21 also provide deposition testimony on the number of customer service  
22 representatives at various facilities. (See Thomas Dep. 25:4-8,  
23 36:2-36-17; A. Butler Depo 43:10-17; J. Butler Depo 33:8-11;  
24 Salgado Depo. 25:12-15; Peters Depo. 37:23-38:10; Ribot Depo. 39:1-  
25 5.) Defendants argue that Plaintiff have not presented any  
26 evidence that each state class meets the numerosity requirement.  
27 The court disagrees. Plaintiffs have presented evidence that does  
28 not establish the exact size of the class but does establish that



1 each subclass contains a large number of members, and Defendants  
2 have presented no evidence suggesting otherwise. "Where the exact  
3 size of the class is unknown but general knowledge and common sense  
4 indicate that it is large, the numerosity requirement is  
5 satisfied." Orantes-Hernandez v. Smith, 541 F. Supp. 351, 370  
6 (C.D. Cal. 1982).

7 The court finds that the numerosity requirement is satisfied.

#### 8 **4. Commonality**

9 Second, Plaintiff must demonstrate that "there are questions  
10 of law or fact common to the class." Fed. R. Civ. P. 23(a)(2).  
11 "Rule 23(a)(2) has been construed permissively. All questions of  
12 fact and law need not be common to satisfy the rule. The existence  
13 of shared legal issues with divergent factual predicates is  
14 sufficient . . . ." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019  
15 (9th Cir. 1998). Indeed, "[e]ven a single [common] question will  
16 do," so long as that question has the capacity to generate a common  
17 answer "apt to drive the resolution of the litigation." Wal-Mart  
18 Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551, 2556 (2011) (internal  
19 quotation marks omitted).

20 Defendants challenge Plaintiffs' showing of commonality on the  
21 grounds that they have not offered any evidence to support their  
22 specific state law causes of action; they have not shown a common  
23 policy to require off-the-clock work; and they have not offered a  
24 viable method of demonstrating class-wide injury based on common  
25 proof.

#### 26 **a. State Law Causes of Action**

27 Defendants argue that Plaintiffs have not offered any evidence  
28 to support their causes of action under state law, which include

1 failure to pay minimum wage, failure to compensate for overtime,  
2 breach of contract, quantum meruit, failure to provide adequate  
3 wage statements, and failure to pay all wages owed upon  
4 termination. (Opp. to Class Cert. at 13-18.) Defendants assert  
5 that Plaintiffs have failed to show how they can establish the  
6 elements of each state law claim on a classwide basis. With  
7 respect to breach of contract, for instance, Defendants assert that  
8 Plaintiffs do not set forth the terms of any contracts, explain how  
9 they were breached, or explain how to adjudicate such a cause of  
10 action on a classwide basis. (Id. at 15.)

11 Plaintiffs contend that they do not need to present such  
12 evidence at this time. (Reply to Class Cert. at 6.) They claim to  
13 have presented evidence of common questions of law and fact  
14 centering on the issue of why customer service representatives were  
15 not paid for work they did before and after their shifts.  
16 Resolving these common questions will be the basis for determining  
17 whether there were violations of state laws during the merits  
18 phase. They compare the determination on state law claims to  
19 determination of damages, which does not in itself defeat class  
20 certification even if it is not susceptible to class treatment.  
21 See Yokoyama v. Midland Nat. Life Ins. Co., 594 F.3d 1087, 1089  
22 (9th Cir. 2010)(internal quotation marks and citation omitted)("The  
23 potential existence of individualized damage assessments . . . does  
24 not detract from the action's suitability for class certification.  
25 Our court long ago observed that the amount of damages is  
26 invariably an individual question and does not defeat class action  
27 treatment." ).

28

1 The court agrees with Plaintiffs that if they establish a  
2 common question of fact as to pre-shift and/or other off-the-clock  
3 work, the issue of whether those facts ultimately violate state  
4 laws can be determined at a later phase and is comparable to a  
5 damages calculation, which does not defeat class treatment even if  
6 it involves individual calculations.

7 **b. Common Policy**

8 Defendants assert that Plaintiffs have not provided proof of a  
9 common policy of requiring off-the-clock work, and that they cannot  
10 make such a showing because Defendants have always prohibited off-  
11 the-clock work.<sup>3</sup> Plaintiffs respond that, to the contrary, they  
12 have provided proof of a number of common policies relevant to the  
13 alleged off-the-clock work requirement. The court shall address  
14 each purported policy separately.

15 **i. Instructions from supervisors**

16 Plaintiffs have presented substantial deposition testimony to  
17 the effect that supervisors instructed customer service  
18 representatives that they needed to be ready to work by the time  
19 their shift started, implying or explicitly stating that employees  
20 needed to arrive early to perform preliminary tasks. See, e.g.,  
21 Exh. 28, Lampton Depo., 47:18-20 ("You were just told if - if you  
22 were not ready and working by 8:00, that there was a possibility  
23 that you could be written up, counseled."); id. 83:10-11 (a manager  
24 repeatedly "said that policy was everybody was to be at their desk  
25

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26 <sup>3</sup> Defendants refer generally to employee handbooks without  
27 point to specific sections, citing Andernacht Decl., Exh. A; Booth  
28 Decl., Exh. C; and Lingo Decl., Exh. D. The court declines to  
scour the 50-70 page handbooks for passages where off-the-clock  
work is prohibited.

1 ready to work at their scheduled time."); Exh. 38, Ernst Depo.,  
2 123:25-124:7 (it was verbally communicated that employees needed to  
3 be ready to answer calls at the beginning of their shift); Exh. 29,  
4 A. Butler Depo., 92:9-92:21; 146:20-24 ("So if a customer service  
5 representative did not arrive early enough to perform the pre-shift  
6 tasks before their scheduled shift they were 'talked to' by  
7 management instead of 'admonished'"); Exh. 36, Mills Depo., 89:24-  
8 90:17 ("So when the 8:00 o'clock time came, or whatever time you're  
9 supposed to time in, you can get into the computer - not get into  
10 it, but be able to navigate it to get all ready to go . . ."); Exh.  
11 32, Thomas Depo., 34:3-11 ("We were told that we need to be ready  
12 for work at our scheduled time, we need to be on the phone at that  
13 time . . . . At one point we were told that we needed to come in  
14 earlier so that we could log on and be on our phone at our  
15 scheduled time."); Exh. 37, Peters Depo., 33:24-34:1 ("[T]hey  
16 advised us that we need to be up and going by our time - when our  
17 time starts. Be willing - able to take a call."); and Exh. 35,  
18 Luna Depo., 60:7-8 ("[W]e were told to show up 10 to 15 minutes  
19 prior to our shift starting."). (See also Reply to Class Cert. at  
20 2-3 nn. 3-6.)

21 This testimony from multiple facilities is sufficient evidence  
22 that supervisors instructed employees to arrive early to perform  
23 functions necessary to being ready to work at their designated  
24 shift time.

25 **ii. Schedule adherence**

26 Plaintiffs argue that "CSRs were presented with a no-win  
27 situation: comply with Defendants' policy to perform pre-shift work  
28 every day while off-the-clock, or start working at their scheduled

1 time, but be considered out-of-adherence, tardy, and be unable to  
2 effectively perform their duties." (Class Cert. Mot. at 9.)  
3 Plaintiffs point to the "schedule adherence" metric used in  
4 employee performance evaluations. Adherence measures a CSR's  
5 availability to take calls while logged into the system. A CSR is  
6 out of adherence if she is logged in but unavailable to take calls,  
7 as indicated by a code she enters into the phone. One employee  
8 explained schedule adherence as follows:

9 Farmers scheduled you to be in different work modes  
10 throughout the workday such as "available," "lunch," or  
11 "meeting." If you were in a work mode that did not match  
12 up with the work mode that was scheduled for you, you'd  
13 be considered "out of adherence," which would negatively  
14 impact your performance scores.

15 Farmers scheduled you to be in "available" mode at  
16 the start of your shift or very soon thereafter.  
17 However, once you clicked "available," you would almost  
18 immediately start receiving calls from customers. So, if  
19 you started receiving calls without first having all of  
20 your programs up and running, you wouldn't be prepared  
21 with the tools needed to effectively help the customer in  
22 a timely manner. . . .

23 The only other option you had at the start of your  
24 shift was to use "aux" mode while you waited for your  
25 programs to finish loading. However, you couldn't take  
26 calls while being in "aux," so it hurt your adherence  
27 score throughout the day like "after call work," you  
28

1 didn't want to use "aux" mode each and every morning that  
2 you reported to work.

3 Gordon Decl. ¶¶ 8-10.

4 Schedule adherence appears as a metric in performance  
5 evaluations. See, e.g., Exh. 4 (Perry Hall's year end assessment  
6 from 2007) at FAR000019 ("Adherence is an area in which you need to  
7 address and make significant improvements, as you are currently at  
8 74.93%. Our goal, as you know, is 85%. Please focus on improving  
9 this metric.") Performance reports indicate the importance of  
10 adherence in personnel evaluations. See, e.g., Exh. 5, Year End  
11 Assessment of Jonathan Luna, FAR 000053 ("[Y]our schedule adherence  
12 July - Oct. is 82.36%. You are not meeting the adherence to  
13 schedule goal. Our ability to handle calls and meet our service  
14 levels is contingent on the appropriate forecasting of staffing.  
15 Adherence to schedule means you are available to handle our  
16 customers calls which contributes to our ability to forecast  
17 accurately to meet our service level goals and limit abandoned  
18 calls.")

19 Plaintiffs argue that the adherence to schedule metric was  
20 part of the policy to require pre- and post-shift work. If a CSR  
21 arrived at 8:00 a.m. for an 8:00 a.m. shift and immediately logged  
22 into the phone prior to booting up the computer, she would also  
23 have to indicate that she was not able to accept incoming calls by  
24 entering a code. This time would count toward her schedule  
25 adherence; she would be considered to be out of adherence for the  
26 10 to 15 minutes during which she was preparing her computer to  
27 handle calls. "CSRs were presented with a no-win situation: comply  
28 with Defendants' policy to perform pre-shift work every day while

1 off-the-clock, or start working at their scheduled time, but be  
2 considered out-of-adherence, tardy, and be unable to effectively  
3 perform their duties." (Class Cert. Mot. at 9.)

4 Defendants respond that schedule adherence could not have been  
5 a pressure on employees to work off the clock because the target  
6 adherence rate was only 85%, giving full-time employees  
7 approximately 75 minutes per day of time during which they could be  
8 out of adherence. Plaintiffs assert that the target adherence rate  
9 was not 85% but 90%, citing Jennifer Butler's performance report  
10 (Reply re Cond'l Cert at 9; Exh. 11 at TWE000041)("Jennifer, your  
11 adherence stands at 91.48% and you are exceeding your expectations  
12 in this area. We discussed the importance of adherence when you  
13 first entered the unit. I noticed that you were not ready  
14 excessively. We discussed that your not ready [status] impacts  
15 your adherence, and once this was brought to your attention, you  
16 worked diligently and decrease[d] your not ready time immediately.  
17 Recently, your not ready time has increased. You have been made  
18 aware and said that you would work to decrease your not ready time  
19 so that you continue to exceed your expectations in this area. You  
20 understand the importance of adhering to schedule, which positively  
21 impacts your adherence. It's nice to know that you focus and work  
22 to meet our unit goal of 90% daily.")

23 Defendants are correct that being out of adherence for 10 to  
24 15 minutes would not in itself result in an employee being unable  
25 to meet the 85-90% adherence target. However, other activities  
26 such as bathroom breaks also entered into the calculation of  
27  
28

1 adherence.<sup>4</sup> Furthermore, as seen in Jennifer Butler's performance  
2 evaluation, employees were praised in their performance evaluations  
3 for exceeding adherence goals, and increased adherence rates appear  
4 to lead to a more positive performance report. Pressure to adhere  
5 as much as possible is expressed in the performance reports.<sup>5</sup>  
6 Particularly when taken in conjunction with instructions from  
7 supervisors, the schedule adherence policy thus can be considered  
8 to be part of a policy to encourage pre-shift work.

9 Defendants also assert that employees were not deemed out of  
10 adherence while loading computer programs after logging into the  
11 phones. They cite the "2011 Guidelines for Schedule Adherence"  
12 which states: "At the start of their shift CSA's must hard log into  
13 the phone before booting up the PC. Once the PC is ready the CSA  
14 should log out of the phone and log into CTI. This process records  
15 the CSA's arrival time for attendance purposes. During the start  
16 up process the CSA is considered in adherence when logged into the  
17 phone and not logged into CTI." (Andernacht Decl., Exh. B at  
18 FIE000480.) However, this policy addresses the system after  
19 changes had been made as a result of the DOL investigation, and  
20 there is no indication that it was the previous policy. To the  
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22 <sup>4</sup> Plaintiffs claim that employees are considered out of  
23 adherence if they took phone calls past their shift, when calls  
24 spilled into their lunch breaks, when they needed to enter notes  
25 after a phone call finished, "and so on," but the footnotes  
supporting these claims are empty (Reply to Class Cert. at 12 nn.  
35-36) or do not support the claim they are making (id. n. 34).

26 <sup>5</sup> Defendants argue that the pressure of performance reports  
27 raises an individualized question because it is a subjective  
28 feeling that an employee may or may not have. (Opp. at 22.) The  
performance reports, however, are using "objective" criteria, and  
feeling pressure to meet criteria in performance evaluations is not  
subjective.



1 contrary, Defendants indicate that the phone log-in policy was  
2 changed in 2010.

3 **iii. Timekeeping system**

4 **a. Policy**

5 Plaintiffs argue that it was a Farmers' policy to modify  
6 timecards to reflect scheduled shifts rather than actual time  
7 worked: "Should a discrepancy be found between what the CSR entered  
8 as the time that they actually worked and what Defendants told them  
9 they worked - as reflected in clock-in times and the hours they  
10 were scheduled to work - the gatekeeper [i.e. the supervisor who  
11 approved the timecards] was required to reject the timecard and  
12 instruct the CSR to make 'corrections,' that is, inaccurately  
13 record the time that they actually worked." (Mot. at 7, and n. 22.)  
14 They present a complex set of evidence purportedly supporting this  
15 assertion. For instance, they point to Procedural Documentation  
16 for Timecard Processing which advises supervisors to compare  
17 timecards to the "Supervisor Timecard File" and to the login/logout  
18 time in the phone system, Avaya, and to reject incorrect timecards.  
19 (Exh. 16 at FAR000144, FAR000148, and FAR000149.)

20 Plaintiffs read these and other handbooks as requiring  
21 supervisors to force employees' timecards into the shifts for which  
22 the employees were scheduled, as opposed to the time they actually  
23 worked. It is not clear to the court that these handbooks in fact  
24 amount to such a policy. Neither party has given a clear picture  
25 of how timekeeping worked at Farmers such that the court would be  
26 in a position to interpret the requirements of the handbook.  
27 Defendants did not challenge Plaintiffs' characterization of the  
28 timekeeping system except to say Farmers' policy was that "the

1 electronic time card must show the specific time the employee  
2 starts work, the lunch period, and the time of leaving." (Mot.,  
3 Exh. 13, Employee Manual at FIE00836.)

4 The court is not convinced that Plaintiffs have presented  
5 clear evidence of a policy of changing timecards to reflect the  
6 time employees were scheduled to work instead of the time they  
7 actually worked.

8 Even assuming that Plaintiffs have established such a policy,  
9 the court must consider whether individualized questions  
10 predominate over class questions. The court finds that  
11 individualized questions predominate and that therefore the  
12 question of the timekeeping policy is not suitable for class  
13 treatment.

14 As discussed above, Farmers' handbooks and policy documents do  
15 not present a clear picture of the timekeeping policy. In  
16 addition, Plaintiffs' deposition testimony on the timekeeping  
17 system is ambiguous. On the one hand, the testimony supports a  
18 claim that supervisors required employees to modify their  
19 timecards. (See, e.g., Salgado Depo, 59:3-22 ("Well, I had to  
20 clock out at 5:00, but if I was caught into a call that threw me to  
21 5:10, then I would, yes. I would - we would clock out at 5:00, and  
22 then we were - I was supposed to send this email to our supervisor  
23 to let her know that I - you know, that I was caught into a call  
24 and that's the reason why I was - that I stayed until 5:10."); and  
25 Exh. 37, Peters Depo., 31:17-32:15 ("If the time that you logged in  
26 on the phone did not match the time that was on the green screens  
27 or vice-versa, they would reject it and talk to you and see what  
28 was going on, why it wasn't matching up.")) However, it does not

1 appear to be the case that employees were never compensated for  
2 post-shift work due to the timekeeping policy. See id. 33:8-19  
3 (Peters testified that he revised his timecard to reflect that he  
4 had worked an additional 30 minutes after the end of a shift and  
5 the change was approved by his supervisor and he was paid).

6 Additionally, the deposition testimony raises the question of  
7 whether timecard modification was required only to comply with the  
8 rounding policy and was primarily used to correct discrepancies  
9 shorter than seven minutes, or whether discrepancies of longer  
10 periods were also required to be corrected.

11 Furthermore, Plaintiffs have failed to offer a method of  
12 common proof to demonstrate class-wide injury. In re Graphics  
13 Processing Units Antitrust Litigation, 272 F.R.D. 489, 497 (N.D.  
14 Cal. 2008) (plaintiffs have the burden under Rule 23 "to provide a  
15 viable method of demonstrating class-wide injury based on common  
16 proof."). Plaintiffs propose the following methodology:

17 Following certification of the action, and prior to  
18 trial, class counsel will work with appropriate experts  
19 in the fields of statistical analysis and economics to  
20 determine an appropriate methodology for determining the  
21 average number of hours worked by the class members, most  
22 probably broken down to a daily average, which would then  
23 be utilized by the economist expert to extrapolate total  
24 damages for the entire class. Whether done by sample  
25 depositions, surveys, or some other methodology, the goal  
26 would be to offer proof on a class wide basis such that  
27 the global exposure of the defendant would be fairly  
28

1 arrived at, with the issue of distribution left to the  
2 class counsel and its experts.

3 Decl. John D. Sloan, Jr., ¶ 2. Given the conflicting testimony on  
4 whether Plaintiffs were compensated when they worked beyond their  
5 scheduled times, this methodology for obtaining common proof is not  
6 sufficiently specific to convince the court that individual issues  
7 do not predominate.

8 **iv. Rounding**

9 Prior to January 1, 2011, Farmers rounded time on timecards to  
10 the nearest 15-minute increment: if any employee worked seven  
11 minutes past the end of her shift, she would not be paid for that  
12 time as it was not a "pay impacting" occurrence. (Mot. at 10.)  
13 Plaintiffs claim that this practice deprived them of their pay  
14 because "Defendants never took any steps to determine if the  
15 rounding rule fairly compensated employees," despite their own  
16 policy requiring quarterly audits to "check for any violations of  
17 state or federal regulations including labor law" (Mot. at 10  
18 n.36. (citing Exh. 17 FAR001040-001308).) Plaintiffs do not  
19 present evidence of a detrimental effect on employees because  
20 "Defendants have not yet produced time keeping records for a  
21 representative sample of the CSRs and Plaintiffs are still engaged  
22 in discovering the analytical data necessary to determine if this  
23 policy resulted in systematic under compensation of CSRs." (Id.)

24 Defendants assert that rounding is lawful and that their  
25 practice of rounding was neutral. They claim that Plaintiffs have  
26 not demonstrated that this rounding practice resulted in off-the-  
27 clock work. Plaintiffs respond that whether the system worked to  
28 the detriment of employees is a merits question, and that

1 Defendants do not dispute that they used a system of rounding, and  
2 do not know whether they audited the rounding system. (Reply at  
3 13.)

4 Plaintiffs' only evidence on this point is the lack of audits  
5 of the rounding system undertaken by Defendants, despite their own  
6 auditing policies. Since rounding is a lawful practice,  
7 Defendants' lack of auditing of the rounding system on its own is  
8 not a sufficient factual basis on which to establish a policy of  
9 not properly compensating employees. The court finds that  
10 Plaintiffs have not presented sufficient evidence on this issue to  
11 establish unlawful rounding as a common issue suitable for class  
12 treatment.

#### 13 **v. Conclusion on Commonality**

14 The court finds that Plaintiffs have established common  
15 questions of law and fact with respect to their pre-shift work, but  
16 not with respect to other off-the-clock work or to Farmers'  
17 rounding policy.

#### 18 **5. Typicality**

19 Rule 23(a) also requires Plaintiffs to demonstrate that "the  
20 claims or defenses of the representative parties are typical of the  
21 claims or defenses of the class." Fed. R. Civ. P. 23(a)(3).  
22 "[R]epresentative claims are 'typical' if they are reasonably  
23 co-extensive with those of absent class members; they need not be  
24 substantially identical." Hanlon, 150 F.3d at 1020.

25 Defendants argue that Plaintiffs' claim that they worked off  
26 the clock is not typical. They point to deposition testimony from  
27 putative class members stating that they were not required to work  
28 off the clock. The court has already discussed this issue with

1 respect to commonality and found that Plaintiffs have established a  
2 common question of fact as to whether there was a policy of off-  
3 the-clock work.

4 The typicality inquiry centers on the question of whether the  
5 representative parties have typical claims and defenses. With  
6 respect to that question, Defendants' main objections are, first,  
7 that the named Plaintiffs did not work at all of the facilities  
8 from which the putative classes are drawn and, second, that two of  
9 the named Plaintiffs, Deborah Mills and Rita Dunken, are not  
10 adequate. For the reasons explained below, the court finds that  
11 Plaintiffs have met the typicality requirements.

12 **i. Facilities**

13 Defendants point out that the named Plaintiffs did not work at  
14 all the branch facilities from which the putative class will be  
15 drawn, and argue that they are not typical because they do not have  
16 knowledge of the policies of the other Farmers branches. The court  
17 finds that Plaintiffs have presented sufficient evidence that the  
18 policies at issue were in effect at all Farmers call centers. The  
19 various locations, designated as Help Points or ServicePoints,  
20 appear to be governed by Farmers-wide policies and to use the same  
21 hardware and software systems regardless of the location. Branch  
22 offices of the same company are likely to have the same policies,  
23 and Defendants have presented no indication that they used  
24 different software or had different hardware, for instance. A  
25 named Plaintiff can therefore be typical of the class she seeks to  
26 represent even if she works at a different branch of the same  
27 company. See, e.g., In re Wells Fargo Home Mortg. Overtime Pay  
28 Litig., 527 F. Supp. 2d 1053, 1063-64 (N.D. Cal. 2007) (holding

1 that named plaintiffs were typical of class members working at  
2 other locations "to the extent that they are subject to the uniform  
3 compensation and employment policies that Wells Fargo applies to  
4 all HMCs" and to the extent that "the absent class members shared  
5 the same job title and were subject to the same policies at  
6 issue.").

7 **ii. Typicality of Mills and Dunken**

8 **a. Deborah Mills**

9 Defendants assert that Mills is not typical of the putative  
10 class because she was employed only for four months and only as a  
11 trainee. The court finds that Defendants have not indicated any  
12 differences between a trainee position and a regular position that  
13 would suggest that her injury is not typical of a class member.  
14 Like other class members, she would have been subject to a policy  
15 of requiring off-the-clock work and would have suffered the same  
16 injury as a result. Her typicality does not appear to be impaired  
17 by her trainee status or her relatively brief period of employment.

18 **b. Rita Dunken**

19 Defendants assert that Dunken is not an adequate class  
20 representative because she worked as a claims associate, and thus  
21 answering calls was not her primary job responsibility. (Decl.  
22 Swopes ¶¶ ("Rita Dunken . . . [was a] claims associate[] who, among  
23 other job responsibilities, handled incoming calls to the branch  
24 claims office in Tigard. Most of these calls were from customers  
25 who simply wanted to be transferred to the claims representative  
26 who was handling their claim. They would also receive calls from  
27 insurance agents with questions about claims made by policyholders  
28 that they serviced. In addition to answering such telephone calls,

1 Ms. Dunken . . . had other tasks, such as handling incoming mail,  
2 assisting with mailings, following up on uncashed checks, and  
3 assisting with duties at the reception desk. There were at most  
4 ten claims associates reporting to me at any given time, and only  
5 some of them would handle incoming calls as part of their main job  
6 duties."").)

7 Plaintiffs have presented evidence that Dunken was one of the  
8 claims associates whose primary job duty was answering calls.  
9 (Exh. 8, Dunken Performance Management Form ("Your main job is to  
10 answer the calls for the call center is to provide excellent  
11 customer service on each and every call you take. You continue to  
12 make sure you assist with their concerns and treat them as number  
13 one. . . . Due to your main responsibility as answering calls daily  
14 for Oregon and Washington, you are now limited to new job  
15 responsibilities . . .).) Defendants have not presented any  
16 evidence to suggest, for instance, that Dunken used different  
17 computer software or was otherwise subject to procedures different  
18 from the employees she is seeking to represent, beyond some  
19 variation in her job responsibilities. However, because the  
20 primary component of her job does appear to be the primary  
21 component of the job of putative class members - answering phone  
22 calls - the court finds that Dunken is typical of the class.

23 **6. Adequacy**

24 Finally, Rule 23(a) requires Plaintiff to demonstrate that  
25 "the representative parties will fairly and adequately protect the  
26 interests of the class." Fed. R. Civ. P. 23(a)(4). "Resolution of  
27 two questions determines legal adequacy: (1) do the named  
28 plaintiffs and their counsel have any conflicts of interest with



1 other class members and (2) will the named plaintiffs and their  
2 counsel prosecute the action vigorously on behalf of the class?"  
3 Hanlon, 150 F.3d at 1020.

4 Defendants argue that Plaintiffs are not adequate because they  
5 seek to represent class members at facilities where they never  
6 worked and they submitted declarations that contradicted their  
7 deposition testimony and were subsequently retracted. Defendants  
8 do not explain how either of these points renders the Plaintiffs or  
9 their counsel inadequate by creating conflicts of interest with  
10 other plaintiffs or by calling into question their commitment to  
11 prosecuting the action. The court finds that Plaintiffs have met  
12 the adequacy requirement of Rule 23(a).

#### 13 **7. Predominance**

14 Under Rule 23(b)(3), a plaintiff seeking to certify a class  
15 must show that questions of law or fact common to the members of  
16 the class "predominate over any questions affecting only individual  
17 members, and that a class action is superior to other available  
18 methods for fairly and efficiently adjudicating the controversy."  
19 Fed. R. Civ. P. 23(b)(3).

20 Defendants emphasize the fact that this action contains claims  
21 asserted under the laws of five different states and argue that the  
22 application of the laws of multiple states make the class  
23 unmanageable. They cite In re Charles Schwab Corp. Securities  
24 Litigation, 264 F.R.D. 531, 537 (N.D. Cal. 2009) for the  
25 proposition that "[w]here the laws of various states will govern  
26 the class claims, the differing state laws inject significant  
27 manageability concerns and can prevent certification of the  
28 nationwide class." The court notes, first, that Plaintiffs here

1 are not seeking to certify a nationwide class, but instead five  
2 subclasses, each comprising Plaintiffs of one state. Additionally,  
3 as discussed above, the fundamental question of this case - whether  
4 Defendants had a policy of requiring pre-shift work - does not  
5 depend on the various state laws that would be used to determine  
6 the amount of Defendants' liability if they were found so liable.  
7 Those laws will be relevant in the damages stage and do not mean  
8 that individualized questions will predominate in the primary  
9 litigation stages.

10 The court therefore finds that the requirements of Rule 23(b)  
11 have been met.

### 12 **III. CONDITIONAL CERTIFICATION**

#### 13 **A. Legal Standard**

14 Section 206 of Title 29 of the United States Code requires  
15 that employers pay minimum wages to non-exempt employees. 29 U.S.C.  
16 § 206(a). Section 207 requires that employers pay non-exempt  
17 employees overtime. 29 U.S.C. § 207(a). Pursuant to § 216(b), an  
18 action to recover for failure to make overtime payments or to pay  
19 minimum wages "may be maintained against any employer . . . by any  
20 one or more employees for and in behalf of himself or themselves  
21 and other employees similarly situated." 29 U.S.C. § 216(b). Only  
22 employees who give their consent in writing - or "opt in" - will be  
23 represented parties. Id. This form of representative action is  
24 commonly referred to as a "collective action." "Because non-  
25 parties to a collective action are not subject to claim preclusion,  
26 giving notice to potential plaintiffs of a collective action has  
27 less to do with the due process rights of the potential plaintiffs  
28 and more to do with the named plaintiffs' interest in vigorously

1 pursuing the litigation and the district court's interest in  
2 'managing collective actions in an orderly fashion.'" McElmurry v.  
3 U.S. Bank Nat'l Ass'n, 495 F.3d 1136, 1139 (9th Cir. 2007).  
4 District courts have considerable discretion in managing FLSA  
5 collective actions, including in determining how and when notice is  
6 provided to potential opt-in class members, see Hoffman-La Roche  
7 Inc. v. Sperling, 493 U.S. 165, 171-73 (1989), and whether  
8 certification of a § 216(b) collective action is appropriate,  
9 Leuthold v. Destination America, Inc., 224 F.R.D. 462, 466 (N.D.  
10 Cal. 2004).

11 **B. Discussion**

12 Plaintiffs seek conditional certification of the following  
13 class for notice purposes:

14 All current and former customer facing call center  
15 employees of Defendants, Farmers Services L.L.C., Farmers  
16 Insurance Exchange, and 21st Century Insurance Company,  
17 that held or hold the position of "Customer Service  
18 Representative," "Customer Service Associate," "Customer  
19 Service Advocate," or similar positions between the  
20 relevant statutory period, three years preceding the  
21 filing of the original complaint and the time additional  
22 class members opt-in to the collective action.

23 Excluded from the class are those class members  
24 whose overtime claims were settled in the March 14, 2011  
25 Farmers-Department of Labor Settlement Agreement for  
26 Farmers Services and Farmers Insurance Exchange's  
27 employees at the Overland Park ServicePoint for the time  
28 period between January 1, 2009 to January 1, 2010; the

1 Olathe HelpPoint for the time period between January 1,  
2 2009 to May 10, 2010; the Austin, Texas ServicePoint for  
3 the time period between January 1, 2009 to February 1,  
4 2010; the Grand Rapids HelpPoints call center for the  
5 time period between January 1, 2009 to May 10, 2010, and  
6 for the Grand Rapids ServicePoint for the time between  
7 January 1, 2009 to February 1, 2010. Further excluded  
8 are those whose employment with the Defendants began  
9 after January 1, 2011.

10 (Mot. for Cond'l Cert. at 3.)

11 **1. Standard**

12 The parties first dispute the standard that should apply to  
13 certification of a collective action here. Section 216(b) provides  
14 that a collective action may be maintained where the claimants are  
15 "similarly situated." The statute does not define the term  
16 "similarly situated," and as far as the Court can tell, both the  
17 Supreme Court and the Ninth Circuit have yet to interpret the  
18 phrase. Although courts have taken a few different approaches to  
19 certification of a collective action, see generally 7B Charles Alan  
20 Wright, Arthur R. Miller & Mary Kay Kane, Fed. Prac. & Proc.  
21 § 1807, most courts interpreting § 216(b), including those in the  
22 Ninth Circuit and in California, have adopted a two-step approach.  
23 See, e.g., Wynn v. Nat'l Broad. Co., Inc., 234 F. Supp. 2d 1067,  
24 1082 (C.D. Cal. 2002); Leuthold, 224 F.R.D. at 466-67; see also  
25 Newberg on Class Actions § 24:3 (4th ed. 2008) ("Most courts have  
26 interpreted § 216(b) as requiring an analysis of whether plaintiffs  
27 are 'similarly situated' at two stages in the litigation: when  
28

1 notice to prospective class members is initially sought and then  
2 following discovery."); 7B Wright, Miller & Kane § 1087.

3 At the first stage, the court considers whether to certify a  
4 collective action and permit notice to be distributed to putative  
5 class members. See Thiessen v. General Electric Capital Corp., 267  
6 F.3d 1095, 1102 (10th Cir. 2001). Courts making a notice-stage  
7 determination tend to require "nothing more than substantial  
8 allegations that the putative class members were together the  
9 victims of a single decision, policy, or plan." Id. (internal  
10 quotation marks omitted). A plaintiff "need not show that his  
11 position is or was identical to the putative class members'  
12 positions; a class may be certified under the FLSA if the named  
13 plaintiff can show that his position was or is similar to those of  
14 the absent members." Freeman v. Wal-Mart Stores, Inc., 256 F.  
15 Supp. 2d 941, 945 (W.D. Ark. 2003). "While the standard for  
16 conditional approval at the stage of the litigation is lenient, it  
17 does require some evidentiary support. The lack of any evidence of  
18 similarity or even other potential class members precludes class  
19 certification." Bishop v. Petro-Chemical Transport, LLC, 582 F.  
20 Supp. 2d 1290, 1296 (E.D. Cal. 2008) (emphasis in original); see  
21 Bernard v. Household Intern., Inc., 231 F. Supp. 2d 433, 435 (E.D.  
22 Va. 2005) ("Mere allegations will not suffice; some factual  
23 evidence is necessary."); Freeman, 256 F. Supp. 2d at 945; Grayson  
24 v. K Mart Corp., 79 F.3d 1086, 1097 (11th Cir. 1996) (plaintiffs  
25 may meet their burden "by making substantial allegations of class-  
26 wide [violations], that is, detailed allegations supported by  
27 affidavits which successfully engaged defendants' affidavits to the  
28 contrary" (internal quotation marks omitted)). Plaintiffs will be

1 deemed similarly situated "when there is a demonstrated similarity  
2 among the individual situations [-] some factual nexus which binds  
3 the named plaintiffs and the potential class members together as  
4 victims of a particular alleged" policy or practice. Bonilla v.  
5 Las Vegas Cigar Co., 61 F. Supp. 2d 1129, 1138-39 n.6 (D. Nev.  
6 1999) (internal quotation marks omitted).

7       The second stage often occurs at the conclusion of discovery.  
8 At that stage, courts use a stricter standard of "similarly  
9 situated" by reviewing several factors, including (1) disparate  
10 factual and employment settings of the individual plaintiffs; (2)  
11 the various defenses available to the defendant which appear to be  
12 individual to each plaintiff; and (3) fairness and procedural  
13 considerations. Leuthold, 224 F.R.D. at 467. Where significant  
14 discovery has been completed at the time of class certification,  
15 "some courts have skipped the first-step analysis and proceeded  
16 directly to the second step." See Lockhart v. County of Los  
17 Angeles, No. CV 07-1680 ABC (PJWx), 2008 WL 2757080 at \*4 (C.D.  
18 Cal. 2008) (collecting cases); Pfohl v. Farmers Ins. Group, CV 03-  
19 3080 DT (Rcx), 2004 WL 554834 at \*2-3 (C.D. Cal. 2004).

## 20               **2.Application**

21       The court has already found that Plaintiffs' state law claims  
22 regarding pre-shift work meet the requirements of Rule 23. As the  
23 underlying factual and legal questions are identical with respect  
24 to their FLSA claims, the court finds that even under the more  
25 stringent second stage standard, Plaintiffs have met their burden  
26 with respect to the pre-shift work. As discussed in the analysis  
27 of commonality, there are common questions of fact and law as to  
28 Defendants' policy of requiring pre-shift work which extend across

1 the subclasses. Also as discussed above, Plaintiffs have  
2 demonstrated that individualized issues do not predominate, and  
3 that Defendants do not have defenses that are individual to each  
4 plaintiff. Finally, the court finds that a collective action is  
5 fair and procedurally efficient in this case. Thus, Plaintiffs  
6 have met the requirements for certification of a collective action  
7 with respect to the pre-shift work.

8 Also as discussed above, Plaintiffs have not established that  
9 there was a "single decision, policy, or plan" regarding off-the  
10 clock work except with respect to pre-shift log-in and boot-up  
11 procedures. The collective action, like the Rule 23 action, is  
12 conditionally certified only with respect to the pre-shift work.

### 13 **3. Statute of Limitations**

14 Although Plaintiffs' claims are suitable for treatment as a  
15 collective action, there is a question as to whether the putative  
16 class has claims that are not barred by the statute of limitations  
17 for FLSA claims. The statute of limitations under the FLSA is  
18 two years after the cause of action accrued, or three years for  
19 willful violations. 29 U.S.C. § 255. In a collective action, the  
20 action is considered to have commenced on the date when the  
21 complaint was filed for named plaintiffs, or, for those people  
22 joining the action, on the date on which the person files written  
23 consent with the court. 29 U.S.C. § 256.

24 Here, the original complaint was filed on March 22, 2011.  
25 Thus, the statute of limitations for the named plaintiffs extends  
26 to March 22, 2008, for willful violations.<sup>3</sup> As a result, with no

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27 <sup>3</sup>The court assumes without deciding that Plaintiffs are  
28 (continued...)

1 tolling, the statute of limitations for FLSA claims regarding  
2 willful violations is three years from the filing of the original  
3 complaint (March 22, 2011) for the named plaintiffs, and three  
4 years from the opting in of the other plaintiffs. The named  
5 Plaintiffs who did not work at one of the facilities covered by the  
6 DOL settlement can make claims accrued starting in March 2008 (if  
7 the violations were willful) or March 2009 (if they were not  
8 willful).

9 For parties who have yet to opt in, the statute of limitations  
10 typically is dated three years prior to the date of opting in. If  
11 employees were to opt in on April 1, 2013, they would be eligible  
12 only to make claims dating April 1, 2010, or later. In this case,  
13 Plaintiffs concede that no potential class members who worked at  
14 ServicePoints after February 1, 2010, or at Help Points after May  
15 10, 2010, are likely to have claims, due to the change in  
16 timekeeping and payroll policies. (See Plaintiff's Supp. Briefing  
17 at 8; Exhs. 1-3, FLSA Narratives.) Without tolling, then, no  
18 employees would appear to have live claims.

19 **a. Equitable Tolling**

20 "Equitable tolling is extended sparingly and only where  
21 claimants exercise diligence in preserving their legal rights."  
22 Adams v. Inter-Con Sec. Sys., Inc., 242 F.R.D. 530, 542 (N.D. Cal.  
23 2007) (citing Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96  
24 (1990)). Equitable tolling is appropriate "where the claimant has  
25 actively pursued his judicial remedies by filing a defective

26 \_\_\_\_\_  
27 <sup>3</sup>(...continued)  
28 alleging willful violations. The statute of limitations for non-  
willful violations is two years. This determination will be made at  
the merits phase.



1 pleading during the statutory period, or where the complainant has  
2 been induced or tricked by his adversary's misconduct into allowing  
3 the filing deadline to pass." Irwin, 498 U.S. at 96. See also  
4 Stoll v. Runyon, 165 F.3d 1238, 1242 (9th Cir. 1999) ("Equitable  
5 tolling applies when the plaintiff is prevented from asserting a  
6 claim by wrongful conduct on the part of the defendant, or when  
7 extraordinary circumstances beyond the plaintiff's control made it  
8 impossible to file a claim on time.") "[T]he inquiry should focus  
9 on fairness to both parties." Adams, 242 F.R.D. at 543.

10 Here, Plaintiffs argue that the statute of limitations should  
11 be tolled for opt-ins to the date of filing of the original  
12 Complaint because Defendants "used a motion to dismiss and the  
13 discovery process to run out the clock on the putative class  
14 members' claims." (Plaintiffs' Supp. Brief. at 2.) They also  
15 assert that Defendants withheld the class list and other documents,  
16 including documents regarding the DOL investigation and all copies  
17 of HR manuals. (Plaintiffs' Reply to Defendants' Supplemental  
18 Briefing at 5 n.3, 7.)

19 There is mixed authority as to when equitable tolling should  
20 be used when defendants withhold a class list. District courts may  
21 permit discovery of the names and address of potential class  
22 members at the conditional certification stage. Hoffman-La Roche  
23 Inc., 493 U.S. at 170. Courts appear to agree that disclosure of  
24 the class list is not required until an action has been  
25 conditionally certified. "Under 29 U.S.C. § 216(b), defendant is  
26 only required to provide potential plaintiffs' contact information  
27 after conditional certification of the collective class." Adams,  
28 242 F.R.D. at 543 (citing Hoffman-La Roche Inc. v. Sperling, 493

1 U.S. at 170). However, some courts have found it appropriate to  
2 allow pre-certification discovery of the class list to allow  
3 putative class members to opt in earlier. "Encouraging early  
4 certification furthers the FLSA's broad remedial goal because the  
5 FLSA's limitations period continues to run until the potential  
6 class member opts in, giving rise to a need to identify and provide  
7 notice to potential class members promptly." Whitehorn v.  
8 Wolfgang's Steakhouse, Inc., No. 09Civ.1148(LBS), 2010 WL 2362981  
9 at \*2 (S.D.N.Y. 2010)(internal quotation marks and citations  
10 omitted).

11 Other courts have found it appropriate to grant equitable  
12 tolling when a class list is not produced upon request. In such  
13 cases, "[a]pplying equitable tolling . . . counters the advantage  
14 defendants would otherwise gain by withholding potential  
15 plaintiffs' contact information until the last possible moment.  
16 Faultless potential plaintiffs should not be deprived of their  
17 legal rights on the basis of a defendant's delay, calculated or  
18 otherwise." Adams, 242 F.R.D. at 543. This court agrees.  
19 Although the statute does not require production of the class list  
20 prior to conditional certification, without equitable tolling  
21 defendants have the incentive to delay proceedings and to run the  
22 clock as long as possible. It is therefore more equitable to toll  
23 the statute of limitations to 30 days after the first request for  
24 the production of the class list, the time when Plaintiffs could  
25 reasonably have expected to receive the list.

26 Here, Plaintiffs claim that "Defendants refused to produce a  
27 class list from the outset," referring to the Joint 26f Report,  
28 Dkt. No. 48 (Feb. 16, 2012), which said that "Defendants contend

1 that the Court should not authorize discovery of putative class  
2 members' names and contact information unless it conditionally  
3 certifies a class." Plaintiffs do not indicate any other attempts  
4 to obtain the names of the potential members of the collective  
5 class, presumably based on the authority apparently provided to  
6 Plaintiffs indicating that a class list would not be provided until  
7 a class obtained conditional certification.<sup>4</sup> (Transcript of  
8 hearing on April 1, 2013, 7-8.)

9 Defendants assert that they would be prejudiced by equitable  
10 tolling because it would "increase their potential liability beyond  
11 what they would normally face under the FLSA." (Defendants'  
12 Supplemental Briefing in Opposition to Plaintiffs' Motions for  
13 Certification at 8.) In the court's view, tolling preserves  
14 putative collective action members' rights under the FLSA. The  
15 effect of this is to make Defendants potentially liable for a time  
16 period longer than the period if there were no tolling. However,  
17 in the court's view, the result is not an extraordinary expansion  
18 of Defendants' liability under the FLSA but instead the restoration  
19 of Plaintiffs' ability to recover for alleged violations of the  
20 FLSA.

21 **b. DOL Tolling Agreement**

22 Plaintiffs also assert that all putative collective action  
23 members should be able to avail themselves of the DOL Tolling  
24 Agreement. Defendants contend that only the DOL may assert the  
25 Tolling Agreement. The court finds that the Agreement may be  
26

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27  
28 <sup>4</sup> Plaintiffs reported that the case Defendants cited was  
Mitchell v. Acosta Sales, LLC, CV 11-1796-GAF (Opx), Aug. 29, 2011.

1 invoked by both the DOL and employees, but only by those employees  
2 who worked at facilities investigated by the DOL.

3 The Agreement specifically refers to the ability of the  
4 affected employees to file suit. "The Secretary or affected  
5 employees may ultimately bring legal proceedings under the Act."  
6 (Id. at FIE001163 (emphasis added).) The Agreement also explicitly  
7 states that it may be invoked "in all legal proceedings that may be  
8 brought pursuant to Sections 16(b), 16(c), and/or 17 of the Act."  
9 (Id. at FIE001164.) However, there is no evidence that employees  
10 at facilities not investigated by the DOL were contemplated as  
11 beneficiaries by either party at the time of the agreement.  
12 Extending the settlement agreement to employees not contemplated by  
13 the parties as beneficiaries of the settlement would render the  
14 settlement agreement overly open-ended and vague and would violate  
15 principles of contract interpretation. "To sue as a third-party  
16 beneficiary of a contract, the third party must show that the  
17 contract reflects the express or implied intention of the parties  
18 to the contract to benefit the third party. The intended  
19 beneficiary need not be specifically or individually identified in  
20 the contract, but must fall within a class clearly intended by the  
21 parties to benefit from the contract." Klamath Water Users  
22 Protective Ass'n v. Patterson, 204 F.3d 1206, 1211 (9th Cir. 1999)  
23 (citation omitted). Here, there is no indication in the language  
24 of the settlement agreement that it was intended to apply to  
25 Farmers facilities other than those named.

### 26 C. Conclusion on Conditional Certification

27 For these reasons, the court finds that the FLSA class is  
28 suitable for conditional certification. The statute of limitations

1 shall be tolled to 30 days after the date when Plaintiffs first  
2 requested the class list, which appears to have been when they  
3 served their discovery on January 25, 2012. (Plaintiffs' Reply to  
4 Defendants' Supplemental Briefing, 5 n.3, 9.) The statute of  
5 limitations shall start from February 24, 2012.

6 **IV. Conclusion**

7 For the reasons stated above, the court GRANTS certification  
8 of the class as here defined:

9 All persons who are, or have been, employed by Farmers  
10 Services, LLC., and/or Farmers Insurance Exchange in the  
11 State of [state name] as call center employees who  
12 performed the job duties of a "Customer Service  
13 Representative" or a similar customer-facing job position  
14 with the central duty of taking inbound telephone calls  
15 from policyholders and agents, during the time period  
16 between [start date as determined by state statute of  
17 limitations] and [February 1, 2010, at ServicePoint  
18 contact centers and May 10, 2010, at HelpPoint contact  
19 centers].

20 For the reasons stated above, the court also conditionally  
21 certifies for notice purposes the collective action as here  
22 defined:

23 All current and former customer facing call center  
24 employees of Defendants, Farmers Services L.L.C., Farmers  
25 Insurance Exchange, and 21st Century Insurance Company,  
26 that held or hold the position of "Customer Service  
27 Representative," "Customer Service Associate," "Customer  
28 Service Advocate," or similar positions between the

1 relevant statutory period, three years preceding February  
2 24, 2012, and the time additional class members opt in to  
3 the collective action.

4 Excluded from the class are those class members whose  
5 overtime claims were settled in the March 14, 2011 Farmers-  
6 Department of Labor Settlement Agreement for Farmers Services  
7 and Farmers Insurance Exchange's employees at the Overland  
8 Park ServicePoint for the time period between January 1, 2009  
9 to January 1, 2010; the Olathe HelpPoint for the time period  
10 between January 1, 2009 to May 10, 2010; the Austin, Texas  
11 ServicePoint for the time period between January 1, 2009 to  
12 February 1, 2010; the Grand Rapids HelpPoints call center for  
13 the time period between January 1, 2009 to May 10, 2010, and  
14 for the Grand Rapids ServicePoint for the time between January  
15 1, 2009 to February 1, 2010. Further excluded are those whose  
16 employment with the Defendants began after February 1, 2010,  
17 at ServicePoint contact centers and May 10, 2010, at HelpPoint  
18 contact centers.

19  
20 IT IS SO ORDERED.

21  
22 Dated: July 17, 2013

  
23 DEAN D. PREGERSON  
24 United States District Judge  
25  
26  
27  
28